



December 21, 2009

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Proposed Rule to Govern Gift Cards Under the Credit Card Accountability Responsibility and Disclosure Act of 2009, Docket No. R-1377

Dear Ms. Johnson:

On behalf of the National Association of Convenience Stores (“NACS”), we welcome this opportunity to provide our views in response to the Federal Reserve Board (“Board”)’s request for comments concerning a proposed rule to implement the new requirements for certain prepaid products (primarily gift cards) in the Credit Card Accountability Responsibility and Disclosure (“Card”) Act of 2009.¹ NACS is an international trade association representing more than 2,200 retail companies and 1,800 supplier company members. The U.S. convenience store industry has nearly 145,000 stores across the nation. While 49 of the largest 50 convenience store chains in the United States are members of NACS, the majority of NACS members are small, independent convenience store operators. In fact, more than 60 percent of all convenience stores are single-store companies.

Overview

The Notice solicits comments on the Board’s proposal for restrictions on dormancy, inactivity, or service fees for prepaid products, and a prohibition on sales of such products with expiration dates of less than five years. NACS’ concerns primarily relate to implementation and compliance from the perspective of retailers who sell prepaid products, specifically:

- Interaction of the new minimum five year expiration restriction with state escheat laws that require surrender of unused prepaid card funds in less than five years – the Board should declare such state laws to be inconsistent with, and preempted by, the federal regime;

¹ Electronic Fund Transfers; Proposed Rule; Request for Public Comment, 74 Fed. Reg. 60986 (Nov. 20, 2009) (“Notice”).

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- Retailer liability for fee disclosure and expiration date compliance – the rules should clarify that retailers will not be liable for any issuer failure to comply with disclosure and expiration date requirements;
- Transition practicalities – retailers should not be required to discard any remaining stock of prepaid cards that do not comply with the new rules once those rules become effective, but should be permitted to sell out that stock;
- Scope of the exceptions to the definition of prepaid products – the exceptions should be clarified so devices like payment codes that allow access to car washes, which many gas stations and convenience stores utilize, are not swept within the rule’s purview, as these are not the types of devices the statute intends to cover;
- Regulatory protection of entities that merely accept prepaid cards as a form of payment;
- The Board’s specific question on the feasibility of physically separating gift cards covered by the new rules from cards that would not be covered – convenience stores typically have very limited space in check out areas, and the Board should be aware that this can make it infeasible for covered gift cards to be physically separated from those not covered by the rules; and,
- The Board’s assumption that the new regulatory regime will have little impact on small retailers – NACS represents many small retailers, and these retailers do sell the types of reloadable general purpose cards that will be covered by the rule. Consequently, it is erroneous to conclude that the gift card regulations will have little impact on small retailers.

Our specific comments and concerns regarding each of the foregoing issues are discussed below.

Pre-emption of Certain State Escheat Laws

Under the Card Act, gift cards² must now have a minimum five year expiration period.³ Yet many states apply escheat laws to gift cards that require any unused gift card funds to be partly or fully turned over to the state in a shorter time period – often in three years.⁴ NACS members have raised the question of what would happen if a retailer

² References in these comments to “gift cards” are intended to encompass the entire range of prepaid products covered by the Card Act and the Board’s rules.

³ See Card Act § 401 (creating new Section 915(c) of the Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq.).

⁴ E.g., Alabama (certain types are presumed abandoned, and subject to partial or total escheat, three years after June 30 of the year in which the certificate was sold (Ala Code §35-12-72(a)(17)); Alaska (gift certificate is presumed abandoned three years after is it unclaimed by the owner (Alaska Stat. §34.45.240)); Iowa (gift certificates unclaimed by the owner three years after issuance are abandoned (Iowa Code §556.1 et seq.)); Louisiana (gift certificate is presumed abandoned three years after December 31st of the year it was sold (La. Rev. Stat. Ann. §9:151 et

who issues a gift card turns over unused funds after three years and the cardholder subsequently attempts to use the gift card, after the funds have been given to the state but before the card can lawfully expire under federal law.

Conceivably, the issuer or retailer could still be obligated to honor the gift card in that instance because federal law prohibits its expiration before year five. This would force retailers or issuers to foot the bill for gift card funds that essentially get caught in the gap between state and federal demands, which would be unfair and unreasonable, and undoubtedly not something Congress intended.

Although it acknowledges that some states apply escheat laws to unused gift card funds⁵, the Board's proposed rule does not address the question of what should happen when a state requires escheat – and therefore, surrender of the consumer's unused gift card funds – in less than five years. Such state laws provide the consumer with less protection of their unused gift card funds than the five years provided under the Card Act.

seq.)); Maine (for a "gift obligation" or stored-value card, two years after December 31st of the later of the year in which the obligation or the most recent transaction involving the obligation or stored-value card occurred (Me. Rev. Stat. Ann. tit. 33, §1953(G)), and for a prefunded bank card, three years after the later of December 31st of the year in which the obligation or the most recent activity involving the prefunded bank card occurred (Me. Rev. Stat. Ann. tit. 33, §1953(G-1)); Montana (a gift certificate is presumed abandoned and subject to partial or total escheat (with certain exceptions depending on the size of the seller) three years after December 31 of the year in which the certificate was sold (Mont. Code Ann. §70-9-803(g)); Nebraska (a gift certificate or gift card which contains an expiration date or requires any type of post-sale finance charge or fee which is unredeemed for a period of three years from the date of issuance shall be presumed abandoned (Neb. Rev. Stat. §69-1305.03 2008 L.B. 668)); Nevada (sixty percent of the unredeemed or uncharged value remaining on a gift certificate which is issued or sold in Nevada and which has an expiration date is presumed abandoned on the expiration date); New Mexico (gift certificate is presumed partially or fully abandoned three years after December 31st of the year it was sold (N.M. Stat. Ann. §7-8A-1 et seq.)); North Carolina (sixty percent of the face value of any gift certificate or electronic gift card bearing an expiration date and remaining unredeemed or dormant for more than three years after the gift certificate or electronic gift card was sold is deemed abandoned (N.C. Gen. Stat. §116B-53(c)(8)); Pennsylvania (gift cards with expiration dates or that charge fees may escheat if not redeemed two years or more after its redemption period has expired, or for five years or more from the date of issuance if no redemption period is specified (Pa. Cons. Stat. tit. 72, §1301 et seq.)); Tennessee (gift cards issued after December 31, 1998 with expiration dates or that charge fees may escheat if unclaimed by the owner upon the earlier of the expiration date of the certificate or 2 years from the date the certificate was issued (Tenn. Code Ann. §66-29-135); Texas (stored value card is presumed abandoned to the extent of its unredeemed value on the earlier of the card's expiration date or three years after the card was issued or last used (Tex. Property Code Ann. §72.1016)); Washington (a gift certificate or a credit memo issued in the ordinary course of an issuer's business which remains unclaimed by the owner for more than three years after becoming payable or distributable is presumed abandoned (Wash. Rev. Code §63.29.140)); West Virginia (a gift certificate is deemed partly or fully abandoned three years after December 31 of the year in which the certificate was sold) (W. Va. Code §36-8-2(a)(7)); Wyoming (a gift certificate in an amount greater than \$100 that remains unredeemed for more than three years after issuance is deemed abandoned (Wyo. Stat. §34-24-114)). Source: <http://www.ncsl.org/programs/banking/giftcardsandcerts.htm> (containing a survey of state laws related to gift cards and similar items).

⁵ Notice, 74 Fed. Reg. at 60987.

Since the federal law creates a “floor for the protections set forth in the Act,”⁶ and the EFTA already requires the preemption of state laws that are inconsistent with the EFTA,⁷ the Board should declare that state laws requiring escheat in less than five years are inconsistent with the Card Act’s five year expiration period, and are, therefore, pre-empted. This declaration will head off any potential difficulties that would be presented by attempts to comply with both state escheat laws and the federal five year expiration.

Retailer Liability for Fee Disclosure and Expiration Date Compliance

The Card Act imposes a number of disclosure requirements on gift cards. The disclosures must address any fees associated with the cards, as well as any expiration date applicable to the card itself or to the funds stored on the card. As a practical matter, the handling of fees and expiration dates is part of the card issuer’s role, and retailers cannot, and do not, control the disclosures that issuers place on cards.⁸ Convenience store retailers’ knowledge about the terms associated with the gift cards they sell can be analogized to their knowledge of the ingredients listed on the packages of chewing gum they sell: it is highly unlikely that the retailer will be knowledgeable about either. Therefore, retailers should generally be absolved of responsibility for any issuer non-compliance with the fee and expiration date disclosures.

Fee Disclosures

The statute requires the issuer or “vendor”⁹ of gift cards to make fee disclosures *before* purchase,¹⁰ regardless of the method of purchase (e.g., in person, via Internet), which raises the question of how the disclosure requirement could be complied with for sales in person. The Board’s rule proposes that such “inform-the-customer” obligations can be complied with for in-person sales if the disclosures are on the gift cards themselves and are visible to the consumer without having to remove packaging or other materials sold with the card.¹¹ And if the disclosures on the card are obstructed by packaging or other materials, they must be present on the packaging sold with the gift card or in another manner visible to the consumer.¹² Alternatively, the fee disclosures can be made orally before sale to the consumer.¹³

⁶ *Id.* at 60988.

⁷ *See id.* (discussing the EFTA’s preemption provision).

⁸ The situation is different, of course, where a retailer is the issuer of the gift card. In that case, NACS does not oppose the disclosure obligation being placed upon the issuer-retailer.

⁹ The statute does not define the term “vendor,” but we presume for purposes of this discussion that the term refers to retailers who sell products covered by the statute.

¹⁰ Card Act § 915(b).

¹¹ *See* Notice, 74 Fed. Reg. at 61011.

¹² *Id.*

¹³ *See id.* at 61006 (proposed Rule 205.20(c)(2)).

As a preliminary matter, the Board should absolve retailers from compliance liability where the retailer is not the issuer of the card, because in such cases retailers do not control the disclosures that are placed on the card, or the packaging. Thus, if a NACS member merely sells gift cards issued by another, unaffiliated entity – a restaurant chain, for example – and that issuer fails to place the appropriate disclosures on the gifts cards or card packaging, the retailer who merely sells the cards should not be held responsible for the issuer’s failure.

In any event, we strongly encourage the Board not to include oral disclosures concerning gift card fees as part of the disclosure regime, which could inadvertently create an expectation that retailers have some duty to provide oral disclosures. It would be unwise and impractical for any disclosure regime to rely to any degree on oral disclosures by retail sales clerks.

From our perspective, sales clerks are often the only person staffing a convenience store at a given time. This lone person is already responsible for assisting customers, ringing up sales, handling the sale of age-restricted products like alcohol and tobacco and importantly, carrying out the ID check duties associated with those products. These employees already have a plethora of responsibilities without adding an obligation to remember and correctly relate information about gift card fees to customers.

Moreover, allowing gift card purchasers to rely on oral disclosures will simply invite litigation over the disclosures, and saddle retailers with all of the evidentiary difficulties associated with proving the occurrence and substance of an oral statement. It also should be pointed out that many other products sold in stores require some type of disclosure, and none of those disclosure regimes rely on oral disclosure by the retailer. The Surgeon General’s health warning on cigarettes and country-of-origin disclosure on certain food products are but two examples. It would be unthinkable to expect disclosures such as these to be made by the sales clerk to a customer purchasing the cigarettes or food item.

NACS does not disagree with the need for fee disclosures. We do, however, believe it is unrealistic to encourage anyone to expect or rely on oral, in-person disclosures from sales clerks. Accordingly, we urge the Board to delete oral disclosure from its list of suggested methods of disclosure (at least in the in-person sales context), and rely instead on written disclosures.

Expiration Date Disclosures

NACS has particular concern regarding compliance with the expiration date requirements because the wording of the statute makes it unlawful for any person “to sell” a gift card that expires in less than five years.¹⁴ Moreover, the Board seeks to require disclosure of any expiration date that applies to the gift card itself, or to the underlying funds stored on the card.¹⁵ Because these two expiration dates may not be the same (as may often be the case with general use gift cards branded by one of the major electronic payment systems such as Visa, MasterCard or American Express), the Board’s

¹⁴ Card Act § 915(a).

¹⁵ See Notice, 74 Fed. Reg. at 60998-61001.

expiration date disclosure proposal can present somewhat of a more complicated compliance challenge for retailers.

The expiration date issue presents a two-fold problem for retailers: the first problem is how retailers can realistically be expected to monitor the countless cards that revolve through their inventory (or sit for an unpredictable amount of time) with pre-printed expiration dates to ensure that none of the cards expire sooner than five years after they are purchased by a customer. The second problem is how retailers can be expected to comply with the separate but related requirements that prohibit expiration of underlying funds in less than five years and require disclosure of a different expiration date for the underlying funds, if any. We should reiterate that unless a convenience store retailer has issued the card, they almost never know what the expiration date of a card is, nor would they know whether, or when, the underlying funds might expire.

NACS appreciates the Board's acknowledgement that compliance with such requirements can be difficult and confusing from a practical standpoint, and the Board's proposal of two alternative bright line rules to address the practical concerns. The first alternative would simply prohibit the sale of pre-printed cards that expire in less than five years.¹⁶ We view this alternative as unworkable because it puts the onus on retailers to know the expiration date of every single card they sell. While the Board has justified this suggested approach based on an assumption that some retailers already have computer systems in place that are capable of preventing sales of expired or nearly expired cards, the Board should be aware that most small convenience store retailers do not have such systems.¹⁷ Thus, the simple prohibition on sales of pre-printed cards that expire in less than five years will place a very onerous burden on these retailers to know the expiration date of every card they sell.

The second alternative the Board proposes is for issuers, distributors and sellers of gift cards to implement procedures that would give consumers a "reasonable opportunity" to buy a gift card that expires at least five years from date of purchase. Such procedures could entail, for example, issuers pre-printing cards with expiration dates in six or seven years, rather than five, and inventory control procedures that would ensure that gift cards do not sit in a warehouse for a year or more. If such procedures are followed, the Board proposes that no one would be charged with checking the individual expiration date of each card sold.¹⁸ NACS views this as a more workable approach for its members, especially smaller retailers.

In any case, because retailers do not control what issuers print on the cards they issue, and do not control issuers' flow of inventory, retailers should not be liable for an issuer's failure to comply with expiration date rules (unless, of course, the retailer itself has issued the card). Thus, for example, the retailer should not be held responsible for non-compliance where an issuer pre-prints an expiration date on a card that is less than five years, or a date that is five years away but the issuer delays shipping the cards to the retailer, leaving less than five years from the time of sale to expiration.

¹⁶ *See id.* at 60998-99.

¹⁷ *Id.*

¹⁸ *Id.* at 60999.

As for cards that expire on different dates than the underlying funds, the Board proposes to require any such circumstances to be disclosed on the cards themselves, along with information on how to obtain a new card.¹⁹ In practical terms, this requirement would put the onus on the card issuer to make the appropriate disclosure on the card, although the rule does not contain a clear provision absolving retailers from any failure to provide proper disclosure. NACS asks that the Board clarify that a non-issuing retailer is not responsible for an issuer's failure to make proper disclosures in this regard.

Practical Effects of Implementation Timing

NACS appreciates the Board's recognition that the timing of implementation may present concerns for gift card vendors, particularly with respect to the disposition of any gift card inventory that does not comply with the new rules.

The statute requires that the Board adopt final gift card rules by February 22, 2010, and the rules must become effective no later than August 22, 2010. The Board seeks comment on the potential costs that would be incurred if it decides to require the removal and replacement of all non-compliant stock after August 22, 2010.²⁰ It is unlikely that the six months between February 22 and August 22, 2010 will allow sufficient time for all non-compliant cards to work their way through the stream of commerce. Thus, we anticipate that there will be a fair amount of non-compliant inventory remaining in retailers' hands, and it would be burdensome to expect retailers to simply throw away this inventory unless issuers agreed to replace it with compliant cards.

The Board also seeks comment on whether it should develop a means for grandfathering non-compliant stock in the marketplace on the rule's effective date, allowing cards with non-compliant disclosures to be sold so long as the cards comply with the substantive aspects of the new rules, such as the restrictions on fees and expiration.²¹ NACS does not oppose such a grandfathering regime, so long as the obligation for complying with the associated notice requirement the Board would impose (to let consumers know of the Card Act's new fee and expiration terms) is placed on issuers and not the retailers who merely sell the cards. Alternatively, if a notice obligation is imposed on vendors, we suggest the development of Board-endorsed, standardized notice that could be posted on gift card displays to facilitate compliance with this requirement.

Finally, comment is sought on the appropriate transition period after which all cards must fully comply with the new rules.²² We urge that retailers should be allowed to sell the "old" cards until their inventory runs out (in the absence of them being replaced by issuers with compliant cards). This approach should allow sufficient opportunity for any remaining non-compliant cards to work their way through the stream of commerce, without imposing a tremendous burden on retailers to discard this inventory.

Scope of the Exceptions to the Definition of Prepaid Products

¹⁹ *Id.* at 60999-61001.

²⁰ *Id.* at 61002.

²¹ *Id.*

²² *Id.*

Convenience stores often provide customers with numerical codes that can be used to access a car wash, or open a storage area containing re-fill tanks for barbeque grills, as two examples. The codes allow the customer to pay for the item or service in the store and then go to a “self-service” area outside the store to obtain whatever it is the customer purchased.

Under a strict reading of the definition of “store gift card” in the statute and the proposed rule, such codes and other similar devices used by convenience stores could fall within the definition because they could be considered codes issued to a consumer in a specified amount in exchange for payment that are redeemable by the merchant for goods or services.²³

There is no indication that either Congress or the Board intends for the gift card rules to regulate car wash codes and the like. This fact is underscored by the list of exceptions to the definition contained in the statute, which the Board seeks to implement.²⁴ However, NACS wishes to bring the scope of the definition to the Board’s attention so that the Board is aware that it could be interpreted broadly enough to cover car wash codes, as well as a host of other devices that retailers use for the convenience of their customers to allow them to pay for a service or goods and then use the service or pick up the goods. Other examples are codes that one might obtain over the phone when pre-paying for movie admission, or codes one might obtain for paying for parking, which then must be entered in an electronic parking meter.

These devices are not provided to customers for purposes of gift giving, and are not marketed as such. Accordingly, they fit within one or more of the exceptions the Board describes for (1) items that are not marketed as gift cards to the general public;²⁵ (2) reloadable cards not labeled or marketed as gift cards (if the codes are reusable, which could be interpreted as “re-loadable”);²⁶ or (3) items issued in paper form only (depending on how the code is provided to the customer).²⁷

In the various examples the Board provides of items that fit within the exceptions, devices such as car wash codes were not included. NACS urges the Board to include examples like car wash codes in the exceptions in the final rule, to more explicitly define the universe of items the Board intends (and does not intend) to regulate.

Liability of Entities That Merely Accept Gift Cards as Payment

The statute is worded such that there appears to be no liability imposed on entities that merely accept gift cards as payment if it turns out that such gift cards do not comply

²³ *See id.* at 60990.

²⁴ *See id.* at 60991-60996.

²⁵ *See id.* at 60994-95.

²⁶ *See id.* at 60992-94.

²⁷ *See id.* at 60995.

with the new requirements.²⁸ And the Board’s proposal does not address liability of those accepting gift cards.

It is possible that a consumer who unsuccessfully tries to use a gift card that is non-compliant through some fault of the issuer – an issuer, for example, who fails to ensure that funds on the card remain valid for at least five years – could conceivably attempt to hold the retailer who dishonored the gift card responsible. For this reason, we ask the Board to clarify that those who merely accept gift cards as payment bear no liability to consumers if the gift card does not comply with the Board’s rules.

Other Issues Raised by the Board’s Proposal

There are two additional issues raised by the Board that NACS wishes to comment on. The first issue concerns sale of certain cards that will not fall under the rule’s definition of “gift card” (reloadable cards that are not marketed as gift cards, but are used as an alternative to a bank account) so long as they are displayed completely separately from “gift cards.” The Board seeks comment from retailers on whether it would be feasible to sell such cards separately from gift cards, such as whether there is sufficient room in checkout areas for completely separate display of these cards from gift cards.²⁹ The Board should be aware that convenience stores often have very limited space in checkout areas. Therefore, it may often be infeasible for there to be a separate physical space for marketing the different types of cards.

Second, the Board’s regulatory impact analysis has concluded that small merchants (defined by the Small Business Association as having annual receipts of less than \$7 million or fewer than 500 employees) would not be significantly impacted by the Board’s gift card rule because few of these retailers sell the types of reloadable, general purpose, open loop gift cards (e.g., with the Visa, MasterCard or American Express logo) that typically impose dormancy and service fees, have expiration dates, and would thus be subject to the rule.³⁰

The majority of NACS members are small, independent convenience stores, and these stores do in fact sell the types of reloadable, general purpose, open loop gift cards that would be subject to the rule. Therefore, the Board’s gift card rules can have a very substantial impact on these stores, particularly if the Board’s regime imposes gift card fee and expiration date disclosure obligations on them. The impact on small businesses is yet another reason why the Board should not impose these disclosure obligations on retailers who merely sell gift cards and do not issue them.

* * *

²⁸ See generally Card Act § 401 (imposing restrictions on the ability of a person (presumably the issuer) to impose certain fees, and prohibiting the sale or issuance of products (presumably by issuers or retailers) that do not comply with the Act’s expiration date requirements, with no apparent imposition of obligations on a person who simply accepts gift cards as payment).

²⁹ Notice, 74 Fed. Reg. at 60993.

³⁰ *Id.* at 61004.

NACS appreciates this opportunity to comment on the FDA's implementation of rules governing the sale and marketing of tobacco products, and looks forward to sharing its views in future proceedings. If you have any questions concerning these comments, please contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John E. Kelly". The signature is fluid and cursive, with a large, stylized "J" and "K".

Vice President
Government Relations
National Association of Convenience Stores